

**Final Statement of Reasons**  
**Proposed Regulations: SELECTION PROCESS FOR PRIVATE**  
**ARCHITECTURAL AND ENGINEERING FIRMS**

UPDATE OF INITIAL STATEMENT OF REASONS

**Section 10000.9** provides specific authority to amend contracts entered into. The provisions are necessary to ensure that the Authority has flexible contracts that can be amended as the need arises.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF JUNE 23, 2006 THROUGH AUGUST 7, 2006

Note: There was no request for a hearing pursuant to Government Code section 11346.8, subdivision (a). The only comments received came from Professional Engineers in California Government ("PECG") with a letter dated August 7, 2006.

COMMENT NO. 1 (PECG letter dated August 7, 2006, page 2, paragraphs 3 and 4)<sup>1</sup>

California Constitution, Article XXII sections 1 and 2 authorize the "State of California" to choose to contract for A&E services, and that nothing contained in Article VII of the California Constitution shall be construed to limit, restrict or prohibit the State from contracting for these services.

The "State of California" is the Legislature. Thus, the Authority's rulemaking authority is limited to promulgating regulations that implement the selection process for A&E services contracts.

RESPONSE:

The Government of the State of California is made up of three branches: the Executive, the Legislative, and the Judicial. (Calif. Const., Article III, Sec. 3.) The executive branch of government executes and implements programs. Ordinarily, it is the agencies of the executive branch that contract for services.

California Constitution Article XXII was added by Proposition 35. Apparently, PECG is suggesting that all Proposition 35 has done is to allow the Legislature to provide for the contracting out of A&E services, and that without such provision state agencies cannot do so. Such a suggestion conflicts with the tri-partite nature of the government of the State of California and the nature, in particular, of the executive branch.

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<sup>1</sup> Quoted matter is indicated through the use of block indentation.

In a recent published decision, *Consulting Engineers and Land Surveyors of California, Inc. v. Professional Engineers in California Government* (2006) 140 Cal. App. 4th 466, the Third District Court of Appeal rejected PEEG's contention that "the State" means only "the Legislature."

The state includes the executive branch and its agencies. It is illogical to interpret Proposition 35's mandate allowing the state to contract out architectural and engineering work as excluding such agencies. After all, it is through those agencies that the state conducts its business. For example, Caltrans builds and maintains freeways; and it is Caltrans, not the Legislature, that would contract for architectural and engineering services to accomplish this objective. In other words, it is governmental agencies, like Caltrans, that the voters allowed to contract out for such services.

(*Id.*, 479.)

Likewise, it is the Authority, and not the Legislature, which has the duty to plan, to design, and to construct a high-speed rail system. (Public Utilities Code sections 185030 to 185036.) The use of private contractors to perform architectural and engineering services needed for such planning, designing, and construction is consistent with the constitutional and statutory scheme established by Proposition 35. Indeed, Proposition 35 appears to encourage A&E contracting, as the following provision suggests:

It is the intent of the people of the State of California in enacting this measure . . . [t]o encourage the kind of public/private partnerships necessary to ensure that California taxpayers benefit from the use of private sector experts to deliver transportation . . . and other infrastructure projects.

(Prop. 35, Sec. 2(b).)

In addition, the constitutional provisions added by Proposition 35 are self-executing. Constitutional provisions are presumed to be self-executing and to have effect without legislation unless a contrary intention is clearly expressed. (*People v. Hernandez* (1986) 179 Cal. App. 3d 1084, 1092.) Normally, the constitution provides for legislative action when so intended. There is no such language in Proposition 35. In fact, provisions of Proposition 35 place restrictions on the Legislature's ability to enact laws to implement its mandates, such as (1) requiring a two-thirds roll call vote of each house of the Legislature in order to amend the Government Code sections added by the Proposition, (2) limiting such amendments to those which further the measure's purposes, (3) providing that the measure's provisions shall prevail over any conflicting act of the Legislature, and (4) requiring a liberal construction of the measure in order to accomplish its purposes. (See, e.g., Proposition 35, section 5; Govt. Code §§ 4529.18, 4525.19, and 4525.20.)

Finally, it must be noted that Proposition 35 did not repeal existing statutes pertaining to A&E services. Government Code sections 4525 et seq. remain in effect, except that, as a result of Proposition 35, there are no longer any constitutional restrictions on contracting out A&E services. This negation of restrictions is the result of Proposition 35's reference to Article VII of the Constitution, as contained in the following provision added to the Constitution:

Nothing contained in Article VII of this Constitution shall be construed to limit, restrict or prohibit the State . . . from contracting with private entities for the performance of architectural and engineering services.

(Cal. Const. Art. XXII, Sec. 2.) Although there is no express reference to "contracting out" in Article VII, that provision has been interpreted to restrict the contracting out of state services. (See *Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal. 4th 543, 548.) That restriction has been expressly lifted, for purposes of A&E services, by Proposition 35.

In conclusion, as stated in Proposition 35, "the State of California and all other governmental entities . . . shall be allowed to contract with qualified private entities for architectural and engineering services." (Cal. Const. Article XXII, section 1.) The "State of California" includes state agencies, such as the Authority.

COMMENT NO. 2 (PECG letter dated August 7, 2006, page 3, paragraph 1 through the first four lines of text on page 4)

The Authority's definition of "project" is unauthorized by law. Government Code § 4527(a) requires the Authority to advertise for contract to provide architectural and engineering services. Each contract would provide services for a proposed project. In response, private firms submit a Statement of Qualifications (SOQ) to provide services for the proposed project. [fn del.] Based on the SOQ's and interviews regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services for each proposed project, the agency head selects firms deemed to be the most highly qualified to provide the services required. (Gov. Code 5 4527(a).)

The Authority claims Government Code sections 4526 and 4529.10 give it authority to expand its definition of a "project" to include "services." Specifically, proposed regulation section 10000.1 (f) expands the definition of "project" to include "any and all transportation projects and any and all related services," and "services which relate to public works of improvement," and to include the nature or scope of work being solicited as defined by a statewide announcement and/or request for qualifications.

However, section 4526 merely authorizes the Authority to promulgate regulations implementing consultant selection procedures, and section 4529.10 merely defines the term "architectural and engineering services." Neither of these

two Government Code sections define the term "project" and neither authorize the Authority to expand the term to include services.

Further, the Authority claims Public Resources Code section 21065 is being implemented or interpreted by proposed regulation 10000.1. Public Resource Code section 21065 concerns policies and practices in the management of natural resources. It has nothing to do with transportation. Government Code sections 4526 or 4529.10 do not authorize the inclusion of this extraneous provision into contracting out selection procedures.

(Original emphasis.)

## RESPONSE:

PECG's comment, that the proposed regulation expands the definition of "project" to include "services," suggests that the definition of "project" is at the core of the applicable law. In fact, the reverse is true. The key definition is that of "services." PECG's comment also suggests that the definition of "project" is limited by the Government Code sections addressing A&E contracts. In fact, it is not. The word "project" is not defined in Government Code sections 4525 et seq., nor is it defined in the provisions added by Proposition 35.

"Services," including A&E services, can be provided in connection with "projects." As the Legislative Analyst's analysis of Proposition 35 noted, "[t]he state and local governments frequently contract with private firms for construction-*related* services, which include architectural, engineering, and environmental impact studies." (Emphasis added.) The same notion is expressed in another statement in the Legislative Analyst's description of Proposition 35, which the Analyst noted would "allow the state and local governments to contract with qualified private entities for architectural and engineering services for all phases of a public works project."

The basis for the Legislative Analyst's statements appears to include the following language from Article XXII, section 1, added by Proposition 35:

The choice and authority to contract [for architectural and engineering services] shall extend to all phases of project development including permitting and environmental studies, rights-of-way services, design phase services and construction phase services.

For example, a construction project may involve one or more construction contracts which are not A&E contracts and which involve the building of improvements. The management and supervision of the construction project, however, constitute a service which falls within the definition of "construction project management" set forth in Government Code section 4525, subdivision (e). Thus, an "A&E" services contract could provide for the management and supervision by a construction project management contractor of the work done by the other contractors who are engaged in building the work of improvement. Consequently, to identify types of "projects" in

connection to which “construction management services” are to be provided is not an “expansion” of the term “project.” It simply enumerates the types of projects for which A&E services, including “construction project management, may be necessary.

It is also possible that the work performed pursuant to non-A&E contracts which are being supervised and managed by a “construction project management” contractor may involve non-A&E services. The proposed regulation 10000.1, subdivision (f), includes the following language, “[p]roject” also includes ‘services’ which relate to public works of improvement or other similar Authority needs.” Thus, the regulation makes it clear that non-A&E services rendered in connection with a project which is managed or supervised by a construction project manager can constitute a proper subject of such management and supervision.

Much of PEEG’s comments are based on a particular view of “project” to which PEEG seeks to apply a specific definition. The problem with PEEG’s approach is that “project” can be applied to the entirety of a major work of improvement as well as to component parts of that work. For example, the State Water Project, as the name implies, is considered a “project,” although it extends from Plumas County in the north to Riverside County in the south, includes numerous storage facilities, pumping plants, canals, underground pipelines, siphons, tunnels, power plants, and the 444-mile California Aqueduct.<sup>2</sup> At the same time, the construction of just one of these facilities, or its later repair or renovation, can be considered a “project.” From the point of view of a contractor hired to build a single pumping plant, that work of construction could be considered a “project,” although in the context of the State Water Project it was also part of a larger project. Thus, the word “project” has an elastic meaning.

In the case of the High Speed Rail Authority, the “project” in which it is engaged can be thought of as the entire high-speed rail system as envisioned in conceptual terms by the Legislature in the High-Speed Rail Act. (See Pub. Util. C. sec. 185010, subdivision (h), referring to “a comprehensive network of high-speed intercity rail systems.” “Project” could also mean a specific work of improvement, such as the construction of a high-speed rail station somewhere along the length of the system. Likewise, preparation of an environmental impact report or an engineering study intended, in part, to determine where a particular alignment should be established, could also be thought of as a “project.” (See, e.g., Pub. Util. C. sec. 185034, subdivision (1), which empowers the Authority, among other things, to

[c]onduct engineering and other studies related to the selection and acquisition of rights-of-way and the selection of a franchisee, including, but not limited to, environmental impact studies, . . . .

PEEG’s comments challenge the inclusion in the proposed regulations of the reference to Public Resources Code section 21065, stating that that section “concerns policies and practices in the management of natural resources” and “has nothing to do

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<sup>2</sup> [www.publicaffairs.water.ca.gov/swp/faqs.cfm](http://www.publicaffairs.water.ca.gov/swp/faqs.cfm), web page of the Department of Water Resources.

with transportation.” In fact, section 21065 defines “project” for purposes of the California Environmental Quality Act to include

an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .

and includes both projects undertaken directly by an agency and those undertaken through contracts with an agency. (Pub. Res. C. sec. 21065 (a) and (b).) Also, as noted above, the Legislature has specifically given to the Authority the power to conduct “environmental impact studies.” (Pub. Util. C. sec. 185034, subdivision (1).)

Contrary to PECG’s comment, a major transportation project, such as the construction of a high-speed rail system consisting of over 700 miles of right-of-way is quite likely to have an impact on the environment. Government Code section 4525, subdivision (f), defines “environmental services” to mean

those services performed in connection with project development and permit processing in order to comply with federal and state environmental laws.

Thus, a reference to Public Resources Code section 21065 is not only permissible, it is positively justified, since the type of transportation project which the Authority is charged with planning, designing, and constructing will require adherence to federal and state environmental laws, including the state environmental law of which section 21065 is an integral part. As Article XXII, section 1, states, “[t]he choice and authority to contract shall extend to all phases of project development *including permitting and environmental studies* . . . .”

Public Contract Code section 10105 is not the exclusive source of the definition of “project” for purposes of the High Speed Rail Authority. That section is part of the State Contract Act, Public Contract Code sections 10100 et seq., and pertains to certain departments specified in Public Contract Code sections 10106 and 10107. However, the High Speed Rail Authority has independent authority to enter into contracts pertaining to the construction of the proposed high-speed rail system. See Public Utilities Code section 185032, subdivision (a)(2), which grants to the Authority exclusive authority and responsibility “for planning, construction, and operation of high-speed passenger train service at speeds exceeding 125 miles per hour,” and Public Utilities Code section 185036, subdivision (a), which grants to the Authority the power to “[e]nter into contracts with private or public entities for the design, construction and operation of high-speed trains.”

Finally, the Authority’s proposed regulation defining “project” is in harmony with previously adopted regulations of the Department of Water Resources which have been approved by OAL. See 23 CCR 381, subdivision (e).

However, in order to eliminate any argument to the effect that the Authority seeks to define “project” in such a way as to exceed the type of project in which it is authorized

to engage, the Authority has revised subdivision (f) of proposed regulation 10000.1 to make it clear that projects, with respect to which A&E contracts are formed, are projects in which the Authority has the authority to engage.

COMMENT NO. 3 (PECG letter dated August 7, 2006, page , paragraphs 1 and 2.)

As discussed above, Proposition 35 and Government Code section 4527 require contracts for services on specifically identified projects. On-call contracts cannot identify a specific project because the contract is for services that may or may not be needed on projects anywhere within the state.

Therefore, the Authority has no authority to promulgate a regulation permitting: on-call contracts, and a regulation purporting to do so must be void.

RESPONSE:

The comment's reference to a discussion "above" concerning a requirement that contracts for services pertain to specifically identified projects is unclear, since there is no such discussion in the earlier portion of PECG's comments. The reference may be to a discussion contained in PECG's comment to regulations proposed by the Department of Transportation, a discussion which is based on an extrapolation from the State Transportation Improvement Plan ("STIP") and the manner in which "project" is defined in connection with the STIP. The STIP, however, has no relevance to the Authority.

The Authority is informed that in a case now pending before the Supreme Court, *Professional Engineers in California Government v. Morales*, No. S139917, PECG is challenging the use by the Department of Transportation of on-call contracts.

The Authority believes that "on-call" or requirements contracts can be legitimate A&E services contracts. For example, a contract calling for supervision over the removal of hazardous substances from the railroad right-of-way, so that the work is done in a manner which complies with environmental regulations, would be a legitimate contract of a type falling within the definition of "environmental services."

However, the Authority has chosen to delete the provision of its proposed regulation, 10000.11, which would have allowed "on-call" or requirements contracts. It does so for the following reasons:

First, in its current stage of development, the Authority will not have a need such services. Second, since the validity of "on-call" contracts has apparently been raised in the pending *PECG v. Morales* case, and given the lack of current need for such contracts on the part of the Authority, the Authority can await the outcome of that litigation and any guidance forthcoming from the California Supreme Court on this issue.

COMMENT NO.4 (PECG letter dated August 7, 2006, page 4, paragraph 3 and 4, and page 5, paragraph 1.)

The purpose of the proposed regulations is to implement the consultant selection procedures that meet the criteria of Proposition 35. Proposition 35's criteria includes cost savings. The cost savings voters require under Proposition 35 is demonstrated in the title of the Act, the "Fair Competition and Taxpayer Savings Act," the Act's expressly stated purpose of providing better value and best value to taxpayers, and the Act's required "fair competitive selection process." The Authority acknowledges the requirement to provide better and best value to taxpayers on page two of the Initial Statement of the Notice of Proposed Rulemaking action.

All these factors demonstrate the cost savings tradeoff voters required under Proposition 35; to authorize more contracting out if doing so results in a better value and best value to taxpayers. (Prop. 35, sections 1,2(a), 2(b), 2(c), 2(e).)

However, the Authority has failed to add the required cost savings criteria to ensure contracting results in better and best value to taxpayers. It costs the State significantly more to hire a private consultant to perform the same architectural and engineering services as a civil service employee.

#### RESPONSE:

PECG's comment is based on an erroneous interpretation of Proposition 35. PECG relies on the title of the measure, "Fair Competition and Taxpayer Savings Act," to draw the conclusion that the Act establishes cost savings as a criterion. The conclusion PECG attempts to reach is the product of a complete misconstruction of the Act.

Contrary to PECG's comment, Proposition 35 does not establish cost savings as a criterion. It does not condition each instance of contracting out on a determination that contracting out will result in less cost. There is nothing in the Act which provides such criteria or conditions.

PECG states that "Proposition 35's criteria includes [sic] cost savings" as is "demonstrated in the title of the Act, the 'Fair Competition and Taxpayer Savings Act.'" However, the title of Proposition 35 does not impose such a requirement. Instead, it states the result which its proponents apparently expected would occur as a result of the measure's passage. In other words, the title represents what the proponents of the Act believed the adoption of the Act would accomplish, rather than the establishment of conditions to application of the Act's provisions. This interpretation is supported by the attached materials and analyses that accompanied Proposition 35.

Furthermore, PECG's comment, that "[I]t costs the State significantly more to hire a private consultant to perform the same architectural and engineering services as a

civil service employee,” is an attack on the premise on which Proposition 35 is based. (See, also, Response to Comment No. 6, below.)

COMMENT No. 5 (PECG letter dated August 7, 2006, page 5, paragraphs 2 - 4.)

Further, the Authority's proposed regulations do not include cost as a factor in the selection process. Even the proposed Estimate of Value of Services regulation (section 10000.4) merely suggests the Authority consider comparing salaries between comparable public and private sector positions, or compare fees paid to other departments' or agencies' contractors for similar services. However, such comparisons do not estimate the value of services required for a particular project. Each project is different, requiring different personnel to perform different duties for different amounts of time. Simply comparing salary scales will not yield the necessary data to estimate the value of services required for different individual projects.

Also, the proposed regulations never require the application of or use of the cost analysis in the consultant selection process. Without such, the proposed regulations do not ensure the cost savings requirements of Proposition 35 are implemented.

Accordingly, the Authority's proposed regulations are inconsistent with the required Proposition 35 criteria, and are therefore invalid.

RESPONSE:

PECG's comment regarding “costs savings” runs counter to the notion of qualifications-based contracting, and is not found as a requirement in the applicable law. Such contracting requires a determination of who is the most qualified to provide the services before the negotiations are conducted. It is during those negotiations that the question of cost is properly considered.

Nowhere in the applicable law is cost identified as a factor in the selection process except during the negotiation process, where the agency is to attempt to reach an agreement in which the compensation is “fair and reasonable to the State of California.” (Gov. C. sec. 4528(a).) The selection of firms with which negotiations are to be held is based on qualifications, *not* on cost factors. Cost becomes an issue once the most qualified firm has been selected and negotiations with that firm have commenced. (*Ibid.*)

There is no case law addressing this point in the context of California's statutes (Gov. C. sections 4525 et seq.), but the point is addressed in rulings pertaining to contracts governed by the analogous federal law, the Brooks Act (40 U.S.C. 1101-1104).

For example, a decision of the Comptroller General stated the following:

Under the Brooks Act, agencies must publicly announce all requirements for A-E services and select contractors for A-E work on the basis of demonstrated technical competence and qualifications. *The procedures do not include price competition*; rather, the agency must select the most highly qualified firm and negotiate a contract with that firm at a fair and reasonable level of compensation.

(*Matter of Photo Science, Inc.* (7/25/05) Comp. Gen. Dec. No. B-296391.) Costs can only be considered during negotiations with the most qualified firm. (*Matter of Mounts Engineering* (1986) 65 Comp Gen 476.) In the advance decision in the *Mounts Engineering* matter, the Comptroller cited the following language from congressional reports reflecting Congress' intent:

"[i]n no circumstances should the criteria developed by any agency head relating to the ranking of architects and engineers on the basis of their professional qualifications include or relate to the fee to be paid the firm, either directly or indirectly."

(*Matter of Mounts Engineering* (1985) 64 Comp. Gen. 772, citing H.R. Rep. No. 92-1188, p. 10; Sen. Rep. No. 1165, p. 8.)

COMMENT NO. 6 (PECG letter dated August 7, 2006, page 5, last paragraph. – page 6, paragraph 2.):

The Authority's notice of proposed rulemaking action reports the fiscal impact of contracting for A&E services on state government is unknown. However, according to the Legislative Analyst's Office, it costs the State of California approximately \$70,000 more per personnel year to have architectural and engineering services performed by a private firm compared to using state civil service employees to perform the same services.

At the Senate Select Committee on Government Oversight on February 18, 2003, Bob Sertige, the Department of Transportation's Budget Director, testified that the average cost of a position in Caltrans' Local Assistance Program is \$92,000 a year. He also testified, "That figure includes salaries, benefits and office expenses." The average salary expenditure for an engineer in the Local Assistance Program is 15% more than the average salary expenditure for a.11 positions budgeted in the Local Assistance Program. Thus, using Mr. Sertige's figure of \$92,000 per position, the average salary expenditure for an engineer in the Local Assistance Program would be \$105,800 per position.

Therefore, it is clear that the fiscal impact on state government to contract out A&E services is known: it costs the State significantly more to contract out than it does to have the same services performed by civil service employees.

(Original emphasis.)

#### RESPONSE:

PECG's comment relies on alleged testimony concerning the costs associated with certain salary expenditures for engineers in Caltrans' Local Assistance Program. However, there is no connection between the alleged testimony and any conclusion concerning the fiscal impact of the adoption of the Authority's proposed regulations.

Putting aside questions of credibility and weight, the "evidence" which PECG cites pertains to a program which has nothing to do with the Authority and which appears to be a limited one and therefore not one from which one could extrapolate meaningful data pertaining to the general use of architectural and engineering services by other agencies.

More importantly, the "evidence" is offered in support of an assertion by PECG, that "it costs the State significantly more to contract out [A&E services] than it does to have the same services performed by civil service employees." This assertion is essentially an attack on Proposition 35, and is in conflict with the Legislative Analyst's analysis of the fiscal impact on the state of allowing the contracting out of A&E services. The assertion might have had some relevance as a ballot argument against adoption of Proposition 35, but the measure was adopted and the assertion is, at a minimum, untimely. Moreover, the assertion is contradicted by the ballot materials associated with Proposition 35.

The Proposition 35 ballot materials included the following analysis by the Legislative Analyst of the fiscal impact on the state of contracting out A&E services:

Eliminating restrictions on contracting out for architectural and engineering services would make it easier for the state to enter into contracts with private individuals or firms to obtain these services. As a result, the state would likely contract out more of these services. This could affect state costs in two main ways.

**Cost of the Services.** The fiscal impact would depend on the cost of salaries and benefits for state employees performing architectural and engineering services compared to the cost of contracts with private firms. These costs would vary from project to project. In some cases, costs may be higher to contract out. It may still be in the state's best interest to do so, however, because of other considerations. For instance, during times of workload growth (such as a short-term surge in construction activity), contracting for services could be faster than hiring and training new state

employees. In addition, contracting can prevent the build-up of a "peak-workload" staff that can take time to reduce once workload declines.

For these reasons, the proposition's net impact on state costs for architectural and engineering services is unknown, and would depend in large part on how the state used the flexibility granted under the measure.

**Impact on Construction Project Delivery.** The ability to contract for architectural and engineering services could also result in construction projects being completed earlier. As noted above, during times of workload growth, the ability to contract for these services could result in projects' completion earlier than through the hiring and training of new state employees. This, in turn, could have state fiscal impacts - such as savings in construction-related expenses. In these cases, faster project completion would also benefit the public as capital improvements would be in service sooner.

(Legislative Analyst's analysis of fiscal impact, contained in Proposition 35 ballot materials.)

COMMENT NO. 7 (PECG letter dated August 7, 2006, page 6, paragraphs 3-4, and page 7, paragraph 1.):

Government Code section 11346.5(a)(13) requires the Authority to determine that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed. The purpose of the proposed regulations is to implement the consultant selection procedures that meet the criteria of Proposition 35. Proposition 35's criteria includes cost savings. The cost savings voters require under Proposition 35 is demonstrated in the title of the Act, the "Fair Competition and Taxpayer Savings Act," the Act's expressly stated purpose of providing better value and best value to taxpayers, and the Act's required "fair competitive selection process."

All these factors demonstrate the cost savings tradeoff voters required under Proposition 35; to authorize more contracting out if doing so results in a better value and best value to taxpayers. (Prop. 35, sections 1,2(a), 2(b), 2(c), 2(e).)

Thus, the implementation of consultant selection procedures with the addition of new cost savings mechanisms would be more effective in carrying out the cost savings purpose of Proposition 35. The Authority's proposed regulations do not include such mechanisms, therefore, they are inconsistent with Proposition 35.

RESPONSE:

PECG's comment is based on a misconception and misconstruction of applicable law. See the Authority's responses above to Comments 4 and 5. Proposition 35

eliminated restrictions on contracting out. Cost savings was a *goal* of Proposition 35, not a *restriction* imposed on A&E contracting. To put it differently, Proposition 35 does not authorize more contracting out *if* doing so results in better value; it encourages contracting out based on the assumption, adopted by the voters who approved the measure, that contracting out *will* result in better value.

COMMENT NO. 8, to Proposed Regulation 10000. (PECG letter dated August 7, 2006, page , paragraphs 1-4):

Section 10000 Purpose and Scope:

States the purpose of the proposed regulations is to establish those procedures authorized and required by Government Code section 4526 and Article XXII of the California Constitution. However, this proposed regulation is inconsistent with the enabling statute and constitutional provision and is beyond the scope of authority granted to the Authority in the following ways:

Requires securing services based on demonstrated competence and professional qualifications. Does not include cost / taxpayer savings as required by Proposition 35.

The Authority states the authority to contract with qualified entities is pursuant to Government Code section 4525(a), however, section 4525(d) is the section that authorizes contracting for architectural and engineering services.

Also, this regulation improperly broadens the purpose and scope of the proposed regulations to include all matters needed for the Authority to carry out its mission and vision. Government Code section 4526 requires the Authority to promulgate regulations implementing consultant selection procedures only. It does not authorize regulations for any other purpose.

RESPONSE:

The role costs play in the A&E selection process is discussed above. See responses to Comments 4 and 5, above. In the qualifications-based process described in the law, the issue of costs or of price or compensation arises only after the best qualified firm has been identified. (Gov. C. sec. 4528, subdivision (a); *Matter of Photo Science, Inc.* (7/25/05) Comp. Gen. Dec. No. B-296391, *supra*; *Matter of Mounts Engineering* (1985) 64 Comp Gen 772, *supra* [Costs can only be considered during negotiations with the most qualified firm.]; *Matter of Mounts Engineering* (1986) 65 Comp. Gen. 476, *supra*.)

The Authority has cited not only Government Code section 4525, subdivision (d), but also subdivisions (e) and (f). Those three subdivisions define the types of services for which the qualifications-based process can be used. Government Code section 4529.10, added by Proposition 35, makes reference to the same services and should be also included. However, section 4525, subdivision (a), does not define “services”

although it does define the professions which provide the types of services described in subdivisions (d), (e), and (f) and in section 4529.10. Consequently, the Authority has revised its proposed regulation to delete the reference to section 4525, subdivision (a), and to add a reference to section 4529.10.

The last paragraph of the comment is based on the misconceptions and misconstructions discussed in the Authority's response to Comment 2. The types of services which can be obtained through the qualifications-based process are limited to those described in Government Code sections 4525(d), (e), and (f), and Government Code section 4529.10. However, the applicable law does not limit the types of projects for which the defined services can be provided.

COMMENT NO. 9, to proposed regulation 10000.1 (PECG letter dated August 7, 2006, pages 7 to 8):

Section 10000.1 Definitions:

(f) the proposed definition of "project" includes "services." The definition of a "project" is provided in statute at 10105 and does not include "services." Government Code section 4526 only authorizes the Authority to promulgate regulations implementing a consultant selection process. It does not authorize Authority to expand the definition of "project." Expanding the definition of "project" does not implement a consultant selection procedure, therefore, section 10000.1 (f) is inconsistent with the enabling statute and goes beyond the scope of authority given to the Authority.

RESPONSE:

PECG's comment is based on a misconception of the applicable law and on a reliance on a flawed meaning of "project" and the role the word "project" plays in the context of the applicable law. See, for greater detail, the Response to Comment No. 2, above.

The definition of "project" contained in the proposed regulation should be understood to be limited to the types of projects or works or services in which the Authority is authorized to engage or for which it is authorized to contract pursuant to applicable law, including the High Speed Rail Act. However, in order to eliminate any doubt on this point, the Authority has revised its definition of project so that regulation 10000.1, subdivision (f), reads as follows (with underlining and strikeout type showing the changes to the originally proposed language of subdivision (f)):

(f) "Project" includes a project as defined in Section 10105 of the Public Contract Code, or as defined in Public Resources Code Section 21065. Project shall also include any and all projects and works in which the Authority is authorized to engage or for which the Authority is authorized to contract pursuant to the High Speed Rail Act, Public Utilities Code sections 185000 et seq. ~~Project shall also include any and all transportation projects and any and all related services including all~~

~~architectural, landscape architectural, environmental, engineering, land surveying, right of way engineering, construction engineering, construction management and project management services. "Project" also includes "services" which relate to public works of improvement or other similar Authority needs. "Services" shall mean any activity described in Section 10000.1 (e) including incidental or ancillary services typically, logically or justifiably performed in connection therewith. Such incidental services may include educational, instructional, training, and public outreach services, providing workshops, making presentations and facilitating meetings. Furthermore, "project" means the nature or scope of work being solicited as defined by a statewide announcement and/or Request for Qualifications.~~

The Authority has also added the word "and" before the word "construction" which had been left out inadvertently in subdivision (e), deleted the references to "right-of-way engineering" and "construction engineering," which are species of "engineering" and therefore superfluous, and corrected a typographical error which had split "construction project management services" into two items: "construction management" and "project management." In place of "right-of-way engineering," the Authority has added to the enumeration of incidental services a reference to "right-of-way service," a service specifically recognized in Article XXII, section 1. Finally, the Authority has stricken the last portion of the last sentence of subdivision (e) concerning the fact that the regulations do not prevent an A&E contractor from consulting legal counsel. The stricken language was superfluous, and striking it does not alter a contractor's right to obtain his own legal counsel.

COMMENT NO. 10 to proposed regulation 10000.2 (PECG letter dated August 7, 2006, page 8):

Performance Data:

Provides for a statewide announcement of proposed projects pursuant to Government Code section 4526, however, goes beyond the authority granted in section 4526 by authorizing a statewide announcement of "services." For the reasons stated above in objection to section 10000.1, this regulation violates the enabling statute.

RESPONSE:

The comment is unintelligible. Government Code section 4526 refers to the adoption of regulations which are to establish "procedures that assure that these *services* are engaged on the basis of demonstrated competence and qualifications for the types of services to be performed . . . ." (Emphasis added.) Government Code section 4527, which provides for the solicitation of statements of qualification, refers to "services." The references in the law, including section 4527, to "project" are references to the projects for which the services are sought. In other words, any announcement

made concerning a “project” pursuant to section 4527 is for services which are to be contributed to that project. See Responses to Comments 2, above.

In addition, it should be noted that the annual solicitation of statements of qualifications described in the first, unlettered paragraph of Government Code section 4527 does not pertain to a specific known “project.” Instead, it is designed to allow an agency to maintain a list of firms who have expertise in those types of A&E services for which the agency may have a need. When a specific need does arise, such as where the agency decides to go forward with a specific project, additional statements of qualifications (“SOQs”) can be solicited with that project in mind. This distinction between SOQs which are obtained annually and which are not “project-specific” and those SOQs which are “project-specific” is recognized in Government Code section 4527, subdivision (a), in the following passage:

The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency [i.e., those obtained annually, on a non-project specific basis], together with those that may be submitted by other firms regarding the proposed project [i.e., those solicited with a particular project in mind], . . . .

Proposed regulation 10000.2 pertains to the annual solicitation of SOQs. (See proposed regulation 10000.5 with regard to project-specific SOQs.)

In order to conform to the statutory language, the language of proposed regulation 10000.2 as originally proposed has been revised to delete the phrase “or more or less frequently as needed by the Authority,” so that the regulation provides for annual requests for SOQs, and the word “may” has been replaced by the word “shall,” making the annual request a requirement rather than an option.

COMMENT NO. 11 to proposed regulation 10000.4 (PECG letter dated August 7, 2006, page 8):

Ignores cost / taxpayer savings requirements of Proposition 35. Criteria does not provide for an estimate of the value of services on each individual project and does not require the Authority to apply or use the estimate in any way.

RESPONSE:

The regulation provides that the “estimate shall serve as a guide in determining fair and reasonable compensation for the services rendered.” Thus, contrary to PECG’s comment, the regulation *does* require that the estimate be used in a particular way.

To the extent PECG again seeks to inject cost factors into the selection process, its effort is in conflict with the qualifications-based selection process established by the law, which provides first for the selection of the most qualified firm and *then* for

negotiations based on fair and reasonable prices or compensation. See, also, Responses to Comments 4 and 5.

Comment No. 12 to proposed regulation 10000.5 (PECG letter dated August 7, 2006, pages 8-9):

(a) Government Code section 4527 requires a statewide announcement through publications of the respective professional societies of all projects requiring architectural and engineering services. This enabling statute does not authorize the Authority to selectively advertise. Therefore, this regulation is inconsistent with the enabling statute and goes beyond the scope of authority granted to the Authority.

(b) According to the enabling statute, Government Code section 4527, the statewide announcement must include a description of the project. As discussed above, the definition of "project" does not include "services" and there is no authority granted to Authority to do so. Authority cannot contract for architectural and engineering services on an unknown project. Thus, a description of the project must be included in the statewide announcement, and a description of services does not meet that requirement.

(c) authorizes the Authority to waive the statewide announcement required under Government Code section 4527(a), however, section 4527(a) does not authorize the Authority to waive the announcement requirement. Section 4527(a) specifically requires a statewide announcement of all projects.

RESPONSE:

With regard to proposed regulation 10000.5, subdivision (a), Government Code section 4527, subdivision (a), requires publication of announcements through the respective professional society publications when A&E services are needed. Consequently, the Authority has revised its proposed regulation to use the word "shall" rather than "may" and to specify that announcement shall be in publications of respective professional societies, thus conforming to the specific statutory language. The second paragraph of subdivision (a) of the proposed regulation has been revised to allow additional media through which the announcement may be published.

With regard to proposed regulation 10000.5, subdivision (b), PECG's comment concerning what is being described again sets up a false distinction between "project" and "services." In this instance, the project may consist entirely of A&E services. For example, the "project" may consist of the preparation of an environmental impact report. In that case, the "services" and the "project" are the same thing, and it is perfectly logical to describe the work to be done in terms of "services." On the other hand, given the legislatively established mission of the Authority, "project" can also mean the construction of a high-speed rail system and everything else which must occur in order for an operating high-speed rail system to come into existence. To describe the "project" in so broad a fashion, however, provides less useful information to a

prospective provider of A&E services than a more narrowly drawn definition, either of the specific project for which the services will be needed, or of the services themselves when the provision of the services in effect constitutes the “project,” as in the case of an environmental impact report or engineering study which is to be prepared in order to assist the agency to choose *where* or *whether* to construct a particular element of a larger project.

Subdivision (b) has been revised to include the word “and” which was inadvertently left out of the originally proposed regulations

With regard to proposed regulation 10000.5, subdivision (c), the Authority has chosen to delete subparagraph (c) which PECG contends was inconsistent with the applicable code section.

In addition, subdivision (d) has been renumbered as subdivision (c), to account for the elimination of the original subdivision (c), and the phrase “for which the services are to be required” was added so as to clarify that A&E contracts involve the provision of services in connection with projects.

COMMENT NO. 13 to proposed regulation 10000.6 (PECG letter dated August 7, 2006, page 9):

This regulation does not include cost / taxpayer savings criteria as required by Proposition 35. As is demonstrated above, Proposition 35 requires that the best interest of the taxpayer be served. By failing to include cost / taxpayer savings criteria in the selection process, Caltrans [sic] is violating Proposition 35.

RESPONSE:

To the extent this comment is directed to the Authority’s proposed regulation (as opposed to Caltrans), the comment is simply a reiteration of PECG’s position that cost must be a factor in the selection process, a position at odds with Government Code sections 4525 et seq., with case law interpreting analogous provisions, and with the provisions of Proposition 35. See Responses to Comments 4 and 5, above.

COMMENT NO. 14 to proposed regulation 10000.7 (PECG letter dated August 7, 2006, page 9):

As is demonstrated above, Proposition 35 requires that the best interest of the taxpayer be served. This can only be accomplished by adding cost savings criteria to the consultant selection and negotiations process.

RESPONSE:

PECG’s comment is simply a reiteration of PECG’s position that cost must be a factor in the selection process, a position at odds with Government Code sections 4525

et seq., with case authorities interpreting analogous provisions, and with the provisions of Proposition 35. See Responses to Comments 4 and 5, above.

COMMENT NO. 15 to proposed regulation 10000.11 (PECG letter dated August 7, 2006, page 9-10):

The First District Court of Appeal has already determined that the Authority has no authority to issue on-call, or needs, contracts. On-call contracts are contracts for services on unknown projects. Government Code section 4527(a) prohibits on-call contracts because it requires contracts for specifically identified projects. The Authority cited Government code section 4526 for authority to issue on-call contracts. However, section 4526 merely requires the Authority to promulgate regulations implementing a consultant selection procedure. It does not give the Authority the authority to expand the definition of a project or allow the Authority to contract for unknown projects.

RESPONSE:

PECG's comment is apparently taken from comments it has made in connection with Caltrans' proposed regulations. The Authority has never been a party to any litigation, let alone a party to any case decided by the First District Court of Appeal.

In any event, the Authority disagrees with PECG's comment. It appears to be based, again, on PECG's confusion of the terms "services" and "project." However, for the reasons stated in the Response to Comment No. 3, the Authority has stricken proposed regulation 10000.11 in its entirety..

COMMENT NO. 16 to proposed regulation 10000.12 (PECG letter dated August 7, 2006, page 10):

Government Code section 4526 requires the Authority to issue regulations implementing a consultant selection process according to the requirements of the Government Code. It does not provide authority for the Executive Director to determine on his or her own whether an emergency exists to allow the Authority to waive or circumvent the consultant selection procedures. It certainly does not provide authority for the Executive Director to make a finding that the best interest of the State would be served by contracting without following the consultant selection provisions. Thus, this regulation is inconsistent with the enabling statute and the Authority is acting beyond its scope of authority.

RESPONSE:

The Authority disagrees with the comment. The Authority is specifically directed to bring into existence a high-speed rail system. In the operation of such a system, an emergency may occur which requires a prompt response. An agency has the implied

power to deal with such emergencies, and the proposed regulation is therefore a reasonable and permissible provision, and one which is compelled by considerations of public safety and public convenience.

It will be in the public interest for the Authority eventually to have the ability to respond to emergencies. However, in its current phase of development, the Authority does not need such a provision, and consequently it has stricken the proposed regulation in its entirety.

## RESPONSES TO PECG's PROPOSED REVISIONS OF REGULATIONS WHICH ARE NOT ACCOMPANIED BY ANY COMMENTS

In addition to its narrative comments, PECG's letter of August 7, 2006, was accompanied by an attachment consisting of proposed revisions of each of several of the Authority's proposed regulations. As to some of the regulations which are among those for which PECG has made suggested revisions, PECG has also made narrative comments, as set forth above. However, as to some of the proposed regulations for which PECG has suggested revisions, PECG has not supplied narrative comments. This latter group of regulations consists of proposed regulations 10000.3, 10000.8, 10000.9, 10000.10, and 10000.14.

It is not the Authority's burden to speculate as to why PECG has suggested a particular revision when the revision is either not accompanied by an explanatory comment or the accompanying comment does not appear to explain the revision. The Authority contends that the mere revision of a proposed regulation is not a "statement, argument, or contention" as those words are used in the context of Government Code section 11346.8, nor is it an "objection" or "recommendation" as those words are used in Government Code section 11346.9.

Notwithstanding the foregoing, as to those regulations for which PECG proposes revisions but offers no comments, the Authority responds as follows.

### COMMENT No. 17

#### PECG'S REVISION TO PROPOSED REGULATION 10000.3

When the Authority is considering contracting for services on a project, the Executive Director shall establish criteria, which will comprise the basis for the selection of a firm or the use of Authority or other staff within state service for providing services for each project. The criteria regarding a firm shall include such factors as professional excellence, demonstrated competence, specialized experience of the firm, education and experience of key personnel to be assigned, staff capability, workload, ability to meet schedules, nature and quality of completed work, reliability and continuity of the firm and / or subcontractors, location, or other considerations deemed relevant. Such factors shall be weighted by the Authority according to the nature of the project, the needs of the State, and complexity and special requirements of the specific project.

## RESPONSE TO PECG's REVISION TO PROPOSED REGULATION 10000.3:

PECG proposes a revision to proposed regulation 10000.3 which would require the Executive Director to consider the use of Authority or other state staff. However, the criteria contemplated in the proposed regulation pertain to the selection of private contractors for A&E services. Presumably, if the Authority has available to it state staff who can perform the work, it can choose to use that staff. However, in that event it will not be contracting for private A&E services as Proposition 35 and Government Code sections 4525 et seq. contemplate. The reason for the criteria are to assist in the process of selecting a private A&E firm, not to assist in deciding whether to have the work done "in house" or through a contract with a private firm.

Nothing in Proposition 35 allows or requires a comparison of costs associated with private contracting as opposed to use of state personnel. Indeed, PECG's revisions appear to conflict with Section 2 of Proposition 35, which includes the following two subdivisions:

- (a) To remove existing restrictions on contracting for architectural and engineering services and to allow state, regional and local governments to use qualified private architectural and engineering firms to help deliver transportation, schools, water, seismic retrofit and other infrastructure projects safely, cost effectively and on time;
- (b) To encourage the kind of public/private partnerships necessary to ensure that California taxpayers benefit from the use of private sector experts to deliver transportation, schools, water, seismic retrofit and other infrastructure projects;

To the extent the suggested revision is intended to inject cost factors into the decision to seek private A&E services, see the Responses to Comments 4 and 5, above.

Finally, the Authority's proposed regulation is essentially the same as that used by the Department of Water Resources, 23 CCR 382, and by the Department of Conservation, 14 CCR 1691, which OAL has approved.

## COMMENT NO. 18

### PECG'S REVISION TO PROPOSED REGULATION 10000.8

Contracts for A&E services are subject to standard accounting practices. The Executive Director ~~may~~ shall require pre-, interim- and/or post-award financial and performance audits as necessary to ensure contract services are delivered within the agreed schedule and budget and that best value for California taxpayers is achieved.

## RESPONSE TO PECG's REVISION TO PROPOSED REGULATION 10000.8:

The language of proposed regulation 10000.8 is completely consistent with Government Code section 4529.14, including the use of “may” instead of PEGC’s use of “shall” in its suggested revision.

PEGC’s revision concerning “best value” is part of its effort to inject cost as a factor in the selection process, and in the process of determining whether to use in-house or state service resources or to engage private A&E firms. See, also, Responses to Comments 4 and 5 and to PEGC’s revision of proposed regulation 10000.3, above.

#### COMMENT NO. 19

##### PEGC’S REVISION TO PROPOSED REGULATION 10000.9

~~Where the Executive Director determines that~~ a change in the contract is necessary during the performance of the services, the parties may, by mutual consent, in writing, agree to modifications, additions or deletions in the general terms, conditions and specifications for the services involved, including extensions of time, with a reasonable adjustment in the firm's compensation consistent with the requirement to provide best value for California taxpayers.

##### RESPONSE TO PEGC’S REVISION TO PROPOSED REGULATION 10000.9:

As to the PEGC’s proposed deletion of language from the first sentence, the Authority does not know why the change is proposed and therefore cannot provide any substantive response.

As to the addition to the end of the proposed regulation, it is unnecessary. The provision which states that any adjustment shall be “reasonable” provides the necessary and appropriate balance which must be struck between the state and a private contractor when an adjustment proves to be necessary, and is consistent with the statutory requirement that any A&E services contract be negotiated for “fair and *reasonable*” compensation. (Gov. C. sec. 4528(a)(1).)

To the extent that PEGC’s suggestion represents an effort to inject cost as a factor, see Responses to Comments 4, 5, and 18, above.

Moreover, the regulation as proposed by the Authority is essentially identical to the corresponding regulation of the Department of Water Resources, 23 CCR 387, and similar, in substance, to the corresponding regulation of the Department of Conservation, 14 CCR 1696, both of which have been approved by OAL.

#### COMMENT NO. 20

##### PEGC’S REVISION TO PROPOSED REGULATION 10000.10

~~Where the Executive Director determines it is necessary or desirable for a project to be performed in separate phases, the Executive Director may~~

~~negotiate a price for the initial phase work. To establish a contract price for the initial portion of phased work, the Executive Director must first determine that the chosen firm is best qualified to perform the entire project. A contract for work to be performed in phases without a negotiated total contract price must provide that the state may, at its option utilize that firm to perform other phases of the work to be later negotiated and reflected in a subsequent written instrument. The procedures established herein with respect to estimates and negotiation as specified herein shall otherwise apply.~~

#### RESPONSE TO PECG's REVISION TO PROPOSED REGULATION 10000.10:

PECG proposes to delete proposed regulation 10000.10 in its entirety. There is no explanation for the suggested deletion and the Authority cannot speculate as to why PECG is suggesting it, in the absence of any narrative comment by PECG.

The Authority notes that major projects often are best completed through phasing, in which the overall project is broken into separate phases or "pieces," a concept recognized in the constitutional provision added by Proposition 35. (See Article XXII, Section 1.) See, also, *Professional Engineers in California Government v. Department of Transportation* (1993) 13 Cal. App. 4th 585, 598.

In addition, the proposed regulation is essentially the same as the corresponding regulations of the Department of Water Resources, 23 CCR 388, subdivision (a), and the Department of Conservation, 14 CCR 1697.

#### COMMENT NO. 21

#### PECG'S REVISION TO PROPOSED REGULATION 10000.13

Where the Executive Director determines that the services needed are technical in nature and involve little professional judgment and that requiring bids would be in the public interest, a contract may be awarded on the basis of bids rather than by following the foregoing procedures for requesting qualifications and negotiation, as long as the contract cost is equal to or less than the value of services calculated in Section 10000.4 of these regulations.

#### RESPONSE TO PECG's REVISION TO PROPOSED REGULATION 10000.13:

The law pertaining to A&E contracting is premised on the notion that a qualifications-based selection process is better than a cost-based selection process where "demonstrated competence and . . . professional qualifications [are] necessary for the satisfactory performance of the services required." In other words, the qualifications-based system of selection for A&E services is based on the notion that professional judgment is a significant part of what is being provided.

On the other hand, in some instances the nature of the work required to be done does not require as much reliance on such professional judgment, in which case the

agency should be free to follow a cost-based selection process. In that case, bids are solicited and, presumably, if there are competing bidders, a fair price will be established. Of course, the agency may choose not to award a contract if none of the bids are satisfactory. However, that determination should not be tied to the estimate prepared pursuant to proposed regulation 10000.4, since that estimate is one which is prepared in the context of an entirely different type of work, work requiring the professional judgment and experience associated with qualifications-based selection

In addition, the estimate prepared pursuant to proposed regulation 10000.4 is prepared for a different purpose than to establish an absolute ceiling on a contract price. Instead, it is prepared as a guide to the agency's negotiator to assist him in negotiating a fair and reasonable price. Unlike a cost-based selection process, which generally has associated with it detailed specifications as to the work to be done and the manner in which it is to be done, the qualifications-based process described in the applicable law is a more dynamic process. The manner in which the work is to be done is part of the discussion which occurs in the course of the selection process, as the following language demonstrates:

The agency head. . . shall conduct discussions with no less than three firms *regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services* and then shall select therefrom, in order of preference. . . no less than three of the firms deemed to be the most highly qualified to provide the services required.

(Gov. C. sec. 4527(a); emphasis added.)

The Authority has made one revision to the proposed regulation. It has added the phrase "Subject to Board approval" to the beginning of the regulation, in order to clarify that the Executive Director's determination is made pursuant to the Board's direction, a fact which is consistent with the fact that the Executive Director "administer[s] the affairs of the authority as directed by the authority." (Pub. Util. C. sec. 185024(a).

## ALTERNATIVES DETERMINATION

The Authority has determined that no alternatives would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective and less burdensome to affected private persons than the proposed regulations. See, also, Response to Comment 7, above.

## LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.